86-1256

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

J. P. JONES, ET AL
Petitioners

vs.

CLARK EQUIPMENT COMPANY

and

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA
Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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Tobias & Kraus

Of Counsel

58 pp

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QUESTIONS PRESENTED

1. Did the Sixth Circuit err by adopting a new and more narrow standard of review for class action settlements rather than examining the fairness of the agreement, as required by all other Circuits?

2. Did the lower courts err by failing to address the adequacy requirement of Federal Rule of Civil Procedure 23(a)(4) where the Union's conflict of interest prevented adequate representation of non-union class members?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the Petitioners Jones, et al (Petitioners) and Respondents Clark Equipment Company (Clark) and International Union, Allied Industrial Workers of America (the Union). Also before the Sixth Circuit was a group of Intervenor-Appellants known as the Hyslop Appellants.

BEST AVAILABLE

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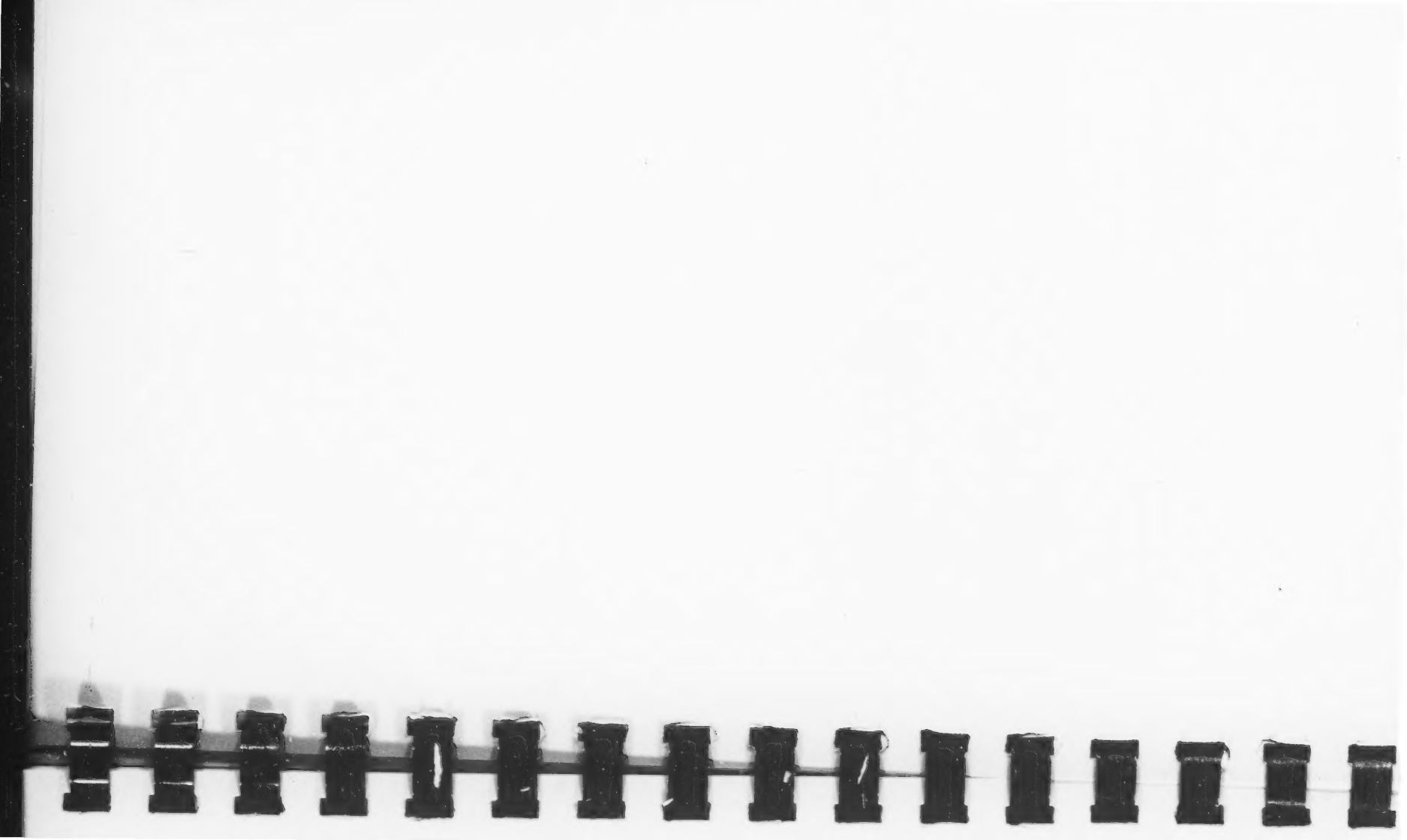

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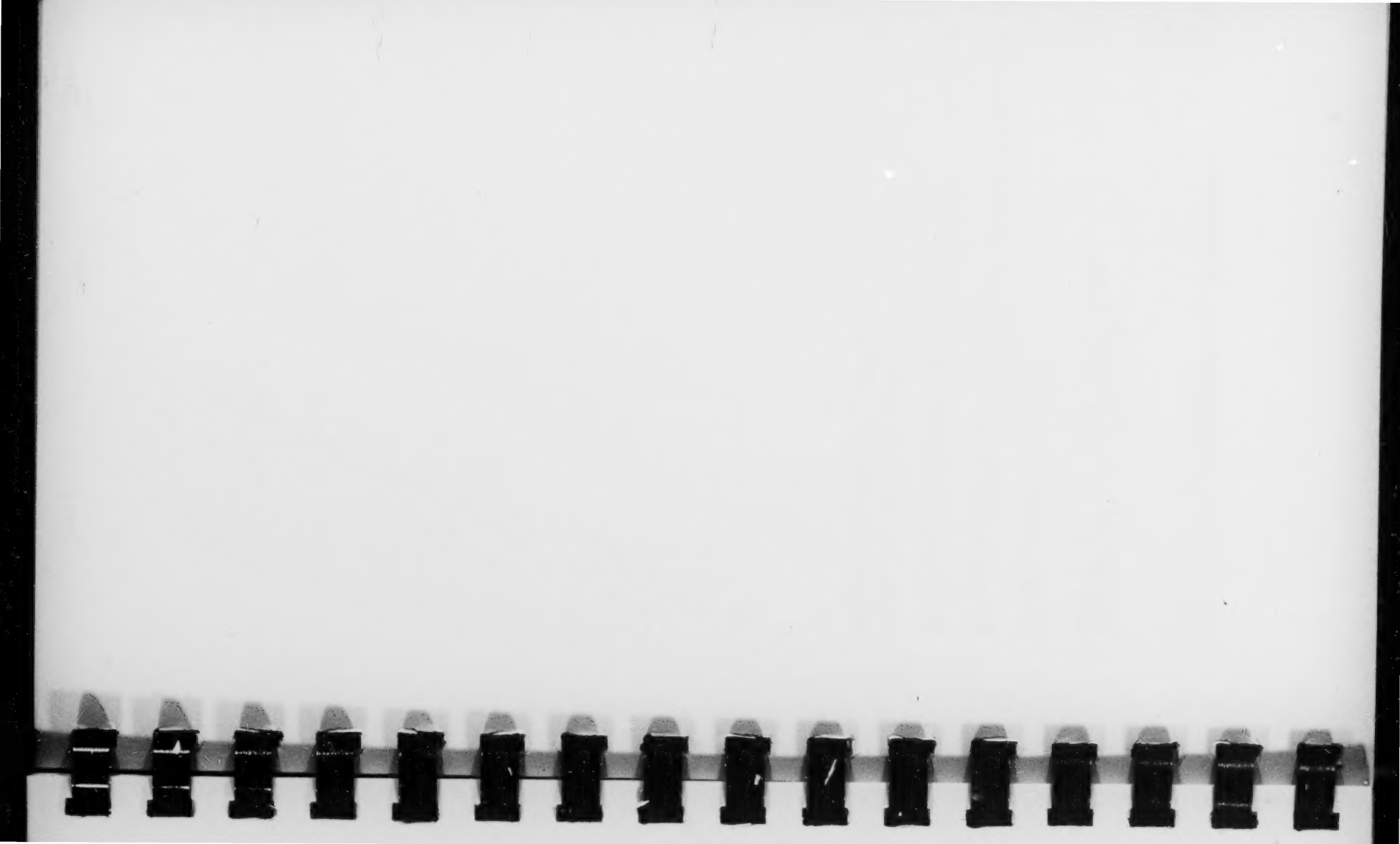

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Petitioners

vs.

CLARK EQUIPMENT COMPANY

and

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA
Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

To the Honorable Supreme Court of the United States of America:

Petitioners respectfully petitions this Honorable Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment of that Court which affirmed an Order of the United States District Court, Eastern District of Kentucky, Lexington Division, certifying a class action and approving a class action settlement. In their behalf, Petitioners show unto this Court:

OPINIONS BELOW

The order of United States Court of Appeals for the Sixth Circuit, filed November 1, 1986, denying Petitioners' request for rehearing is attached hereto as Appendix A. The order and opinion of the Court of Appeals for the Sixth Circuit, filed September 2,

1986, is attached as Exhibit B. The consent order and judgment for the United States District Court, Eastern District of Kentucky, Lexington Division, filed March 12, 1985 is attached hereto as Appendix C.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The decision sought to be reviewed is of the United States Court of Appeals for the Sixth Circuit, dated September 2, 1986. A petition for rehearing was timely filed by Petitioners and overruled November 1, 1986.

The statutory provision believed to confer jurisdiction on this Court to review the judgment below by writ of certiorari is 28 U.S.C. §1254 which provides that cases in the United States Court of Appeals may be reviewed by the Supreme Court by writ of certiorari.

STATEMENT OF THE CASE

Introduction

In this case, the Sixth Circuit held that the fairness of a class action settlement does not have to be examined by a reviewing court. Its decision is contrary to settled law which places an affirmative duty on the courts to review several factors and insure that settlements are fair, reasonable and adequate. In addition, the Sixth Circuit, approved a settlement without addressing the contested issue of a union's adequacy to represent a class which included non-union members. The decision of the Sixth Circuit is erroneous. It should be reversed.

The Facts

This was an action by Respondent Clark Equipment Company (Clark) in the United States District Court for the Eastern District of Kentucky to set aside an arbitration award issued by Arbitrator Nathan Lipson. Federal

jurisdiction was invoked pursuant to 29 U.S.C. §150 and 29 U.S.C. §185. Lipson had awarded Petitioners top seniority at Clark's plant in Georgetown, Kentucky.

The Union, Respondent International Union, Allied Industrial Workers of America, originally sought to enforce Lipson's Award. Clark and the Union settled the case, and later moved to certify all 1280 affected employees, including Petitioners, as a defendant class pursuant to Fed. R. Civ. Pro. 23(b)(2). Despite objections from the non-union Petitioners attacking the Union as an adequate class representative and contesting the fairness of the settlement, the district court approved the agreement and entered final judgment. Though they were no longer Union members, and had interests which conflicted with the rest of the class, Petitioners were bound by the Union's settlement.

The Sixth Circuit panel issued its opinion on September 2, 1986. According to the panel, neither the district court nor the appellate court was under a duty to examine whether the settlement was fair, adequate and reasonable to all concerned. Instead, the panel held that absent fraud or collusion, it would not overturn an agreement negotiated by the parties. Since the panel found no fraud or collusion, the settlement was approved. The standard adopted by the panel is a new one, and conflicts with the test applied by this Court and all other Circuits.

The panel's opinion also failed to address Petitioner's argument that the Union was not an adequate class representative for the non-union Petitioners. Their interests were ignored and sacrificed for the benefit of class members who were part of the Union.

A petition for rehearing was denied November 1, 1986.

HOW FEDERAL QUESTIONS WERE RAISED

Federal questions herein were raised in the briefs in the United States Court of Appeals for the Sixth Circuit.

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT

I. THE COURT ERRED BY ADOPTING A NEW AND FAULTY STANDARD OF REVIEW FOR CLASS ACTION SETTLEMENTS WHICH IS CONTRARY TO THE TEST APPLIED BY THIS COURT AND ALL OTHER CIRCUITS.

The issue is whether class action settlements are to be examined in light of their fairness, reasonableness and adequacy, or whether, as the Sixth Circuit held, a reviewing court need only determine that the agreements are not the product of fraud, collusion or overreaching.

Most private civil actions may be settled by the parties without court intervention or approval. Class action settlements are different. Because absent class members will be forever bound by the agreement, Federal Rule of Civil Procedure 23(e)requires that class actions not be settled or compromised without approval of the court and notice to all class members.

Though Rule 23(e) does not set forth a standard of review, it is "universally" accepted that to be approved, class settlements must be "fair, adequate and reasonable." Officers For Justice v. Civil Service Commission, Etc., 688 F.2d 615, 625 (9th Cir. 1982). This is the standard applied by this Court and virtually every Appellate Circuit in the United States. See: Protective Committee v. Anderson, 390 U.S. 414 (1967); Greenspun v. Bogan, 492 F.2d 375 (1st Cir. 1974); Weinberger v. Kendrick, 698 F.2d 61 (2nd Cir. 1982); Girsh v. Jepson, 521 F.2d 153 (3rd Cir. 1975); Flinn v. F.M.C. Corp., 528 F.2d 1169 (4th Cir. 1975); City of Detroit v. Grinnel Corp., 495 F.2d 448 (5th Cir. 1974); In Re General Motors Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979); Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1974); Officers For Justice v. Civil Service Commission, 688 F.2d 615 (9th Cir. 1982); Holmes v. Continental Can Co., 706

F.2d 1144 (11th Cir. 1983). See also Wright, Miller & Kane, Federal Practice and Procedure, §1797, Moore's Federal Practice, ¶2380.[04], and Newberg on Class Actions, § 1140.

In this case, the Sixth Circuit disregarded all settled principles and created a new standard. The court stated:

> "Similarly, we find persuasive the Ninth Circuit's review of settlements in Officers For Justice v. Civil Service Commission, etc., 688 F.2d 615 (9th Cir. 1982). In Officers For Justice, the court held that a district court's role in evaluating a private consensual agreement "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties".[1] Id. at 625. The court further stated that neither the fairness of the settlement agreement, nor the factual or legal disputes which

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[1]The completed quotation from Officers reads:

> "... and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (emphasis ours)

> underlie the merits of the dispute, need to be examined by the court or appellate courts.[2]
>
> There is no evidence that the present settlement agreement was the product of fraud or collusion between the parties. Intervenors' assertions that the arbitration award was more equitable than the settlement is not a grounds for scuttling an agreement in which both parties, represented by counsel, negotiated a settlement in which certain rights (i.e. transfer rights) were "traded off" for a large monetary award. Thus, absent fraud or collusion, this court does not second guess such a settlement."

Panel Opinion, Appendix B, page 24-25.

The Sixth Circuit has created new law. By misciting, misreading and incorrectly applying the opinion in Officers For Justice, the Sixth Circuit now holds that fairness and reasonableness need not be examined, and that reviewing courts must only be satisfied that

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[2] In fact, the Officers court stated:

> "Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute...". (emphasis ours)

the agreement was not tainted by fraud, collusion or overreaching. The Sixth Circuit stands alone. This new standard is contrary to law and flies in the face of the special protections afforded to class members pursuant to Rule 23.

Of course, the district court is to be wary of fraud and collusion in the settlement process. But the court's job does not end there. The court is to be an active participant in the settlement approval process. The district judge acts as the "guardian" for the rights and interests of absent class members. Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975). The judge is not to sit quietly, and, as in this case, "rubber-stamp" form pleadings drafted by the parties.[3] City of Detroit v. Grinnell, 495 F.2d 448, 463 (5th Cir. 1974). The court's role is to make an independent

---

[3] With few exceptions, the court's final judgment of March 12, 1985 is identical to a proposed judgment submitted by the parties December 21, 1984.

analysis of the settlement's fairness, weighing and balancing several factors. As this Court held:

> "There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all of the facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all judgment which might be obtained, and all other factors relevant to a fair and full assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation".

Protective Committee v. Anderson, 390 U.S at 424-25.

Unlike private agreements, there is no presumption that the parties to a class action have negotiated a fair settlement. The policy in favor of protecting absent class members is paramount. Courts are under an

affirmative duty to see that class action settlements are fair, reasonable and adequate by examining and weighing the factors set forth in Protective Committee v. Anderson, supra.[4]

In this case, the Sixth Circuit ignored the appropriate law and policy. It created a new standard of review and failed to analyze the proper factors. The Sixth Circuit's new test creates a conflict among the Circuits. Accordingly, the panel's decision should be reversed.

II. THE COURT ERRED BY ITS FAILURE TO ADDRESS THE QUESTION OF THE UNION'S ADEQUACY TO SERVE AS CLASS REPRESENTATIVE FOR NON-UNION MEMBERS

It is a cardinal rule that the named class representative must "fairly and adequately protect the interests of the

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[4] The court in Officers for Justice also identified eight factors for the district court to consider in determining the fairness of a settlement. These include: the strength of the plaintiff's case; amount offered in settlement; extent of discovery completed; and reaction of the class to the proposed settlement. 688 F.2d at 625.

class." Fed. R. Civ. Pro. 23(a)(4), Hansberry v. Lee, 311 U.S. 32 (1940). "An absent member will not be bound if he proves the procedure did not adequately insure the protection of his interests". Laskey v. International Union, (UAW), 638 F.2d 954, 956 (6th Cir. 1981).

Courts have special duty to see that the interests of absent class members are not trampled by those directing the litigation. In General Telephone Co. v. Falcon, 457 U.S. 152 (1982), this Court held:

> "The District Court's error in this case...is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper representative under Rule 23(a)."

Id. at 190. The Court also noted:

> "[W]e reiterate today a Title VII class action, like any other class action, may only be certified if the trial court is satisfied after a rigorous analysis, that the prerequisites of 23(a) have been satisfied." Id.

Petitioners contested the Union's adequacy to serve as class representative in both the district court and the Sixth Circuit. They argued that the Union, as an organization, had certain associational and political interests different from those of the individual class members. Petitioners also argued that Union counsel could not simultaneously represent his client, the Union, the 1280 members of the class, and Petitioners, who were no longer Union members. Petitioners asserted that there was inherent conflict due to the limited benefits available in settlement. There were internal class battles for the biggest piece of the pie.

In this case, nothing in the district court's opinion suggests any independent analysis of the adequacy issue, let alone a "rigorous" one. The district court only stated:

> "The named Defendants, as representative parties fairly and adequately protected the interests of the class and the Unions".

Final Judgment of District Court, Appendix C; page 40.

The Sixth Circuit avoided the issue of adequacy altogether. It held:

> "Intervenors' allegation that the union had no standing to represent the class is meritless. Unions have standing to represent a class, even if the union itself alleges no specific injury. International Woodworkers v. Chesapeake Bay Plywood Corp., 659 F.2d 1259 (4th Cir. 1981). The fact that the union represented non-union employees (i.e. the Jones class) does not mandate a different result. This group could have brought an independent action, but instead let union counsel represent them."[5]

Panel Opinion, Appendix B, page 26.

The Sixth Circuit failed to separate the issues of standing and adequacy. The Union may have had standing, but that conclusion does not mean that it was an adequate class representative. Adequacy is an additional

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[5] At no time during the class action did Petitioners "let" union counsel represent them. Because the settlement was reached prior to class certification and notice to the class, Petitioners had no choice. Further, because Rule 23(b)(2) contains no "opt out" provision, Petitioners could not have brought an independent action.

requirement imposed by the Civil Rules to protect the interests of class members. See Fed.R.Civ.P. 23.2 and 23(a)(4). The result is that the settlement was approved despite conflict between the Union and the class, between class members themselves, and despite class counsel's divided loyalties between the Union and the class.

The district court and Sixth Circuit have ignored the principles set forth by this Court and the requirements of Rule 23. Nothing in the record indicates that the requisite independent "rigorous" analysis of the Union's alleged adequacy took place. Given the obvious conflicts among and between the Union and the class, even a cursory review would have led to a finding that the Union was not an adequate representative of the class, especially for the non-union Petitioners.

CONCLUSION

By adopting new standard of review which disregards the fairness, adequacy and reasonableness of class action settlements, the Sixth Circuit has taken a step backward. It has created a conflict in the law where none previously existed. Its reading and application of the Officers For Justice case is incomplete, incorrect, and against established law.

In addition, the Sixth Circuit has sanctioned the district court's outright failure to fulfill its obligation to absent class members. The lower courts have disregarded numerous and valid objections concerning the Union's adequacy as class representative. Its perfunctory approval of the Union is contrary to the obligations imposed by this Court and Rule 23.

The decision below should be reversed.

PRAYER

For the foregoing reasons, Petitioners pray that a writ of certiorari issue directed to the United States Court of Appeals for the Sixth Circuit in this case to the end that the order of that Court and the order of the United states District Court, for the Eastern District of Kentucky, Lexington Division, may be reviewed by this Court and reversed and remanded with direction that the settlement be set aside or in the alternative, that Petitioners not be bound by the judgment.

Respectfully submitted,

Paul H. Tobias
TOBIAS & KRAUS
911 Mercantile Lib. Bldg.
414 Walnut St.
Cincinnati, Ohio 45202
(513) 241-8137
Attorney for Petitioner

David Torchia
TOBIAS & KRAUS
Of Counsel

AFFIDAVIT OF SERVICE

I hereby certify that two copies of the foregoing document were sent by regular U.S. Mail to Charles C. Jackson, Esq., 55 East Monroe St., Suite 4200, Chicago, Illinois 60603; Matthew R. Robbins, Esq., 788 North Jefferson., Milwaukee, Wisconsin 53202; and Joseph J. Vogan, Esq., 171 Monroe, N.W., Suite 800, Grand Rapids, MI 49503, this 27 day of January, 1986.

Paul H. Tobias

APPENDIX A

No. 85-5305/5339

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CLARK EQUIPMENT COMPANY,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	ORDER
INTERNATIONAL UNION, ET AL.,	)	
	)	
Defendant-Appellees	)	
JAMES PATRICK JONES, ET AL.,	)	
	)	
Intervenors-Appellants	)	

BEFORE: KEITH and MARTIN, Circuit Judges and WEBER*

United States District Court

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

---

* Hon. Herman J. Weber sitting by designation from the Southern District of Ohio.

ENTERED BY ORDER OF THE COURT

_____

John P. Hehman, Clerk

APPENDIX B

85-5305
85-5339

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLARK EQUIPMENT COMPANY,

Plaintiff-Appellee

v.

INTERNATIONAL UNION, ALLIED ON APPEAL FROM INDUSTRIAL WORKERS OF AMERICA, THE UNITED AFL-CIO, INTERNATIONAL UNION, STATES DISTRICT ALLIED INDUSTRIAL WORKERS OF COURT FOR AMERICA, LOCAL UNION No. 939 EASTERN DISTRICT and ALL LOCAL 939 MEMBERS and OF KENTUCKY FORMER MEMBERS HAVING SENIORITY STATUS WITH CLARK EQUIPMENT COMPANY as of October 6, 1982,

Defendant-Appellees

JAMES PATRICK JONES, et al.,

Intervenors-Appellants (85-5305)

HYSLOP INTERVENORS,

Intervenors Non-Party Appellants (85-5339)

BEFORE: KEITH and MARTIN, Circuit Judges; and WEBER*, District Judge.

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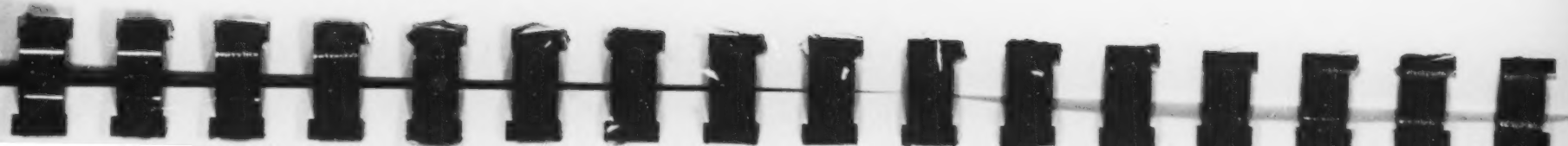
* Honorable Herman J. Weber, United States District Court for the Southern District of Ohio, sitting by designation.



PER CURIAM: Intervenor-Appellants, Hyslop and James P. Jones, appeal the district court's judgment certifying the defendant International Union as a class and approving the settlement agreement entered into by plaintiff, Clark Equipment Company (Company), and defendants in this labor relations action. The primary issue on appeal is whether the district court abused its discretion in approving the settlement agreement. We find there was no abuse of discretion and accordingly affirm the decision below.

This suit arose from Clark Equipment Company's decision to move certain operations from its unionized Battle Creek, Michigan plant to its non-union Georgetown, Kentucky plant. This consolidation of the truck manufacturing company was for economic reasons. A grievance was filed against the company by the union alleging its consolidation plan violated a 1980 Collective Bargaining Agreement (CBA). The grievance was

settled by arbitrator Nathan Lipson. Lipson concluded that the Company had violated the CBA by "denying transfer rights to employees laid off prior to October 8, 1982" and by failing to recognize seniority at Battle Creek for seniority purposes at Georgetown. The arbitrator issued an award which was relatively pro-union in regards to "transfer rights" and seniority rights for the Battle creek, Michigan employees transferring to the Georgetown plant. In June 1984, the Company brought suit in the Eastern District of Kentucky, seeking to have the arbitrator's award vacated on the grounds the award was contrary to language in the CBA, and violated Federal Labor Law:[1] The union moved to

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[1]Specifically, Section 9.162 of the CBA allowed seniority for transferring employees for "regularly employed" employees. The arbitrator found that employees laid off before October 6, 1982, were to be considered "regularly employed". The Company thought this language didn't "draw its essence" from the CBA, and was erroneous. Moreover, the award allegedly violated Federal Labor Law, Sections 8(a)(3) and (b)(2), by discriminating against the non-union Georgetown employees by precluding their right to protect their

dismiss, but while that motion was pending, the Company and the union entered into a settlement agreement. The union held a ratification election at the Battle Creek plant; the settlement was ratified.

On December 19, 1984, the Company amended its complaint to name 1,280 employees as defendants, and requested that the case become a class action with the union as representative. On December 21, 1985, the class was certified pursuant to Fed. R. Civ. P. 23(b)(2). In early 1985, the district court approved the settlement. Intervenors Hyslop and Jones Appeal, requesting the vacating of the settlement and reinstatement of the arbitration award. They also request a reversal of class certification, arguing that subclassing would be more appropriate due to conflicts within the class.

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seniority status.

The central question presented is whether the district court abused its discretion in accepting the class action settlement. This court, in Laskey v. UAW, 638 F.2d 954 (6th Cir. 1981) held that "The acceptance of a settlement in a class action suit is discretionary with the court and will be overturned only by a showing of abuse of discretion. Accepting a settlement over the objections of the named representatives is not necessarily an abuse of discretion." Similarly, we find persuasive the Ninth Circuits review of settlements in Officers For Justice v. Civil Service Commission, etc., 688 F.2d 615 (9th Cir. 1982). In Officers For Justice, the court held that a district court's role in evaluating a private consensual agreement "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties". Id. at 625. The court

further stated that neither the fairness of the settlement agreement, nor the factual or legal disputes which underlie the merits of the dispute, need to be examined by the court or appellate courts.

There is no evidence that the present settlement agreement was the product of fraud or collusion between the parties. Intervenors' assertion that the arbitration award was more equitable than the settlement agreement is not a grounds for scuttling an agreement in which both parties, represented by counsel, negotiated a settlement in which certain rights (i.e. transfer rights) were "traded off" for a large monetary award. Thus, absent fraud or collusion, this court does not second guess such a settlement.

Intervenors raise a number of collateral issues. They contend that since arbitration awards are rarely overturned, and since the NLRB refused to issue an unfair labor complaint, thereby implicitly approving the

arbitration award, indicates that the settlement agreement was improper. Although it is axiomatic that arbitration awards are rarely overturned upon judicial review, we fail to see how this precept undercuts the equally strong policy favoring settlement agreements. Moreover, a refusal by the NLRB to issue an unfair labor practice complaint is "[A]dministrative only, neither formally adversarial nor like a trial. As such it has no collateral estoppel effect." Emery Air Freight Corp. v. Local Union 295, 786 F.2d 93,100 (2d Cir. 1986)(quoting International Union of Electrical, Radio and Machine Workers v. General Electric Company, 1407 F.2d 253, 264 (2nd Cir. 1968)).

Intervenors' allegation that the union had no standing to represent the class is meritless. Unions have standing to represent a class, even if the union itself alleges no specific injury. International Woodworkers v. Chesapeake Bay Plywood Corp., 659 F.2d 1259

(4th Cir. 1981). The fact that the union represented non-union employees (i.e. the Jones class) does not mandate a different result. This group could have brought an independent action, but instead let union counsel represent them. Intervenors argument for subclassing, due to conflicts within the class, is rejected because such a procedure should be left to the trial court's discretion. Subclassing under Fed. R. Civ. P. 23(c)(4) is appropriate only when the court believes it will materially improve the litigation. Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980). The fact that subclassing often leads to more complex and protracted litigation, in conjunction with the company's precarious financial condition, was ample reason for the rejection of subclassing in the instant case.

Finally, we must reject intervenors' contention that class certification after the settlement was inappropriate. A tentative

settlement can precede or be concurrent with class certification. Weinberg v. Lear Fan Corporation, 627 F.Supp. 719 (S.D.N.Y. 1986).

Accordingly, the judgment below is affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

CLARK EQUIPMENT COMPANY,	)	Civil Action
	)	No. 84-181
Plaintiff	)	
	)	Judge Scott Reed
v.	)	
	)	
INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL UNION No. 939, and ALL LOCAL 939 MEMBERS and FORMER MEMBERS HAVING SENIORITY STATUS WITH CLARK EQUIPMENT COMPANY as of October 6, 1982,	)	
Defendants	)	

CONSENT ORDER AND JUDGMENT

At a session of said Court held in the Federal Courthouse, Lexington, Kentucky, on March 12, 1985

PRESENT: HONORABLE SCOTT REED

Certain parties hereto having recommended entry of this Consent Order and Judgment; the absent members of the defendant class herein having been duly notified of the terms of the

General Release and Settlement Agreement entered into herein and of the hearing date on the entry of this consent Order and Judgment and on the approval of said General Release and Settlement Agreement; the Court having held a hearing pursuant to Fed. R. Civ. P. 23(e) at which all absent members of the Defendant class were afforded opportunity to object to the entry of this Consent Order and Judgment or to the approval of the General Release and settlement Agreement, and at which the parties hereto presented evidence in support of the fairness, reasonableness and adequacy thereof; the Court having ordered the parties to recommend a procedure for resolving claims for benefits and having been supplied such a procedure by Plaintiff and Defendants after consultation with counsel for Intervenors; and the Court being fully advised in the premises;

I. Case History And The Substantial Controversy Between the Parties

Case History. Plaintiff Clark Equipment Company (the "Company") filed the Complaint against Defendants International Union, allied Industrial Workers of America, AFL-CIO, and International Union, Allied Industrial Workers of America, Local no. 939 (the "Unions") on June 7, 1984. The Complaint seeks to overturn and vacate an arbitration award issued by Arbitrator Nathan Lipson (the "Lipson Award") dated May 25, 1984. On July 23, 1984 the Unions filed a motion to dismiss on the ground of alleged lack of venue of the court over Local 939. On November 14, 1984 the parties entered into a Settlement Agreement concerning the Lipson Award and on or about November 29, 1984 the Settlement Agreement was formally approved by counsel for the parties. At a Union ratification meeting held on December 8, 1984, Local 939's membership ratified the settlement Agreement. This Settlement

Agreement is attached as Exhibit "A" to the document filed with the Court entitled General Release and settlement Agreement.

On November 20, 1984, the Unions filed their Answer denying that he company was entitled to have the Lipson Award vacated. At the same time, the Unions also filed a counterclaim for enforcement of the Lipson Award under Section 301(A) of the Labor Management Relations Act of 1947. This counterclaim which is compulsory under Fed. R. Civ. P. 13, seeks relief under the Lipson Award on behalf of all Local 939 members having seniority status at Clark Equipment Company, as of October 6, 1982. On or about December 19, 1984, without objection by the Unions, the Company filed an Amended Complaint which named both Unions as Defendants and all members or former members of AIW Local 939 having seniority status with Clark Equipment Company as of October 6, 1982 as a class of Defendants. On or about

December 19, 1984 the Company also filed a Motion for Conditional Class certification. The Unions joined in this Motion, Which was granted by the Court in an Order dated December 21, 1984.

On or about December 29 and 31, 1984,[1] Notice was sent to each member of the class by first class, certified mail providing the following:

1) Notice that the above class was conditionally certified on December 21, 1984, that the result of a judgment approved by the Court would be to bind the parties and the class, and that each class member had the right to intervene through his own individual counsel

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[1] Notice was mailed to a few class members shortly after January 1, 1985 as set forth in the Additional Stipulations of the parties which were received in evidence on January 21, 1985.

and to file written objections with the court, with or without involvement of counsel;

2) A draft copy of this Consent Order and Judgment, as well as the General Release and Settlement Agreement between the parties; and

3) Notice that a hearing under Fed. R. Civ. P. 23(e) on the Court's conditional class certification order, the General Release and Settlement Agreement, and proposed Consent Order and Judgment would take place on January 21, 1985.

On January 21, 1985, the Court conducted a hearing on the propriety of its earlier conditional class certification ruling as well as on the propriety of the General Release and Settlement Agreement and this

Consent Order and Judgment. Written objections and notices of intervention were received from a number of represented and unrepresented members of the proposed class, but the only class members attending the hearing and objecting did so through counsel. Intervening counsel objected to both final certification of the class and entry of the proposed Consent Order and Judgment.

In view of the objections, evidence submitted,and arguments made, and after review of the pleadings and proposed Consent Order and Judgment, The Court finds that the objections should be overruled and the proposed Consent Order and Judgment entered and approved as a fair, reasonable and adequate resolution of the controversy which is the best interests of the class. In this regard, the amendments to the General Release and Settlement Agreement submitted by Plaintiff and Defendants, are hereby also approved, as are Exhibits D and E thereto

(the Proof of Claim Form and newspaper Notice, respectively). The Court also finds that the questions set forth in the Proof of Claim form are appropriate and essential for resolution of claims.

Substantial Controversy Between the Parties. The Lipson Award issued on May 25, 1984 purported to provide certain of the Company's Battle Creek employees (active and on the seniority list) with a number of rights at the Company's Georgetown, Kentucky and Asheville, North Carolina facilities and backpay. The Company's position, as set forth in the Complaint and other court papers, is that portions of the Lipson Award violate the requirements of federal labor law and that the entire Award fails to draw its essence from the applicable collective bargaining agreement, among other reasons.

The Union denies that the Award violates federal labor law and maintains that the Award is otherwise enforceable by this Court.

The Court finds that there is a substantial basis for both views. Although the General Release and Settlement Agreement, as one would expect, does not give either party or the class all the relief arguably available under the Lipson Award, it does provide substantial relief to the Union and the proposed class at a substantial cost to the Company.

In addition to acknowledging the substantial issues of law and fact involved in this case, as well as the merit of the respective positions urged by the parties, the Court also notes the fact that the General Release and Settlement Agreement was drafted in part with the difficult financial position of the Company's Material Handling Products Company Unit in mind. It is

undisputed that the Material Handling Company has been experiencing significant operating losses attributable to its domestic operations at Battle creek, Michigan and Georgetown, Kentucky and that the business environment for the domestic manufacture of the Material Handling Products Company's products is very difficult. Taking into account the substantial legal issues involved, the substantial nature of the settlement, the precarious financial condition of the Material Handling Products Company unit, and the likelihood of burdensome and protracted litigation in the absence of settlement; the Court finds that the defendant Unions have fulfilled their duty of fair representation to the class and have, by entering into this settlement, properly and fairly represented the interests of the class.

NOW THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED as follows:

II. Final Certification of the Class

The Court hereby finds that this action was properly maintained against the Unions and all members of Allied Industrial Workers Local 939 having seniority status at Clark Equipment Company on October 6, 1982 pursuant to Fed. R. Civ. P. 23(b)(2), and accordingly confirms its Order of December 21, 1984 and finally certified the class. See also Fed. R. Civ. P. 23.2. Specifically, the Court finds as follows:

(a) The Class is so numerous that joinder of all of its members would have been impracticable;

(b) This action involved questions of law and fact which were common to the class;

(c) The claims of the named Defendants herein were typical of the claims of the class;

(d) The named Defendants, as representative parties fairly and adequately protected the interests of the class and the Unions;

(e) Plaintiff Clark Equipment Company and Defendants acted or refused to act on grounds that were generally applicable to the class; i.e., with respect to the terms of the May 25, 1984 arbitration decision of arbitrator Nathan Lipson (the "Lipson Award") and the collective bargaining agreement upon which it purportedly is based. The Defendant class is properly certified here because the relief sought in the Amended Complaint is

precisely the opposite sought by the unions in their Answer and compulsory Counterclaim, and affects the same individuals who would benefit from a Union suit to enforce the Lipson award has the Company not first filed a suit to vacate. In such a circumstance, a plaintiff class identical to the Defendant class herein would have been certifiable.

(f) The Complaint, Amended Complaint, Answer and Counterclaim herein sought appropriate final injunctive relief with respect to the class as a whole.

II. Judgment for Injunctive Relief

1. Plaintiff Clark Equipment Company is hereby ordered to accord class members seniority at its Georgetown, Kentucky facility as set forth in he General Release and Settlement Agreement, as amended.

2. Plaintiff Clark Equipment Company is hereby ordered to take the other affirmative actions required by the General Release and Settlement Agreement, including making certain transfer opportunities to and from Georgetown, Kentucky available, affording seniority credit to certain employees transferring back to Battle Creek, Michigan, and amending an earlier letter of agreement between the parties regarding Company option retirements.

3. Defendant Unions and the class are limited to the relief set forth in the General Release and Settlement Agrement and

judgment is entered against them with respect to recovering and further relief under the Lipson Award.

4. Disputes under the General Release and Settlement agreement shall be adjusted in the manner set forth under paragraphs 6-8 thereof, as amended.

IV. Judgment for Damages

JUDGMENT IS HEREBY ENTERED against Plaintiff and in favor of Defendant Unions and class in the amounts specified in the General Release and Settlement Agreement. Such amounts shall be paid to the recipients specified in the amended General Release and Settlement Agreement in the manner stated therein.

V. Approval of Settlement And Effect Thereof

THE COURT HEREBY approves the General Release and Settlement Agreement, as amended, including the terms of this Consent Order and Judgment incorporated by reference therein, pursuant to Fed. R. Civ. P. 23(e). Specifically, the Curt finds that the terms of said General Release and Settlement Agreement are fair, reasonable, and adequate to the absent members of the Defendant class in light of the merits of this action and other pertinent factors, and that the settlement is in the best interests of said class members. Nothing in the general release and settlement Agreement or in this Consent Order and Judgment shall be deemed to be an admission by any party hereto as to the

Company's alleged obligations with regard to the Lipson Award for the purposes of any other proceeding or litigation.

/S/ Scott Reed

United States District Judge